United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7195

United States Court of Appeals
FOR THE SECOND CIRCUIT

DIMITRIOS GARIS,

Plaintiff-Appellant,

against

COMPANIA MARITIMA SAN BASILIO, S.A.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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Statement

This brief is submitted in opposition to the appeal by the plaintiff-appellant from the Order of District Judge Thomas P. Griesa, dated March 12, 1976, dismissing the action on the ground of *res judicata*. This Order granted the defendant-appellee's motion for Summary Judgment, which was based on the fact that prior suits by the same plaintiff against the same defendant, claiming damages for the same injury, had been dismissed for *forum non conveniens*.

This action was filed on December 17, 1974, under Docket No. 74 Civ. 5527 (TPG), on behalf of a Greek seaman who was allegedly injured on September 17, 1965 while the vessel was on high seas. The vessel owner, the defendant-appellee herein, maintained its principal place of

business in Piraeus, Greece, where Garis was hired, pursuant to Greek Shipping Articles, and the Greek Collective Bargaining Agreement.

During the period of Garis' employment, all vessels owned by San Basilio were registered under the Greek flag and were engaged in the tramping trade. All of the directors and stockholders of San Basilio were citizens and residents of Greece.

Prior Litigation

On January 14, 1966, this plaintiff instituted an action in the United States District Court for the Southern District of New York against Compania Maritima San Basilio, S.A., the defendant-appellee in the case at bar. That suit also sought damages for injuries allegedly sustained by the plaintiff in a shipboard accident on September 17, 1965. Compania Maritima San Basilio, S.A. brought on a motion for Summary Judgment, requesting District Court Judge Edward C. McClean to decline the Court's discretionary jurisdiction and relegate the action to the Courts in Greece.

Testimony regarding the status of the parties was obtained in accordance with the order of Judge McClean, who granted the motion and declined to take jurisdiction of the suit. The dismissal was without prejudice to the institution of an action in Greece, where Garis was residing. As a condition to this dismissal, the shipowner agreed to appear in any suit brought by Garis in the Greek Courts, and further agreed to provide security in such suit. Judge McClean's opinion is reported at 261 F. Supp. 917.

Garis thereupon appealed to the United States Court of Appeals for the Second Circuit, which affirmed the dismissal in an opinion reported at 386 F.2d 155. This opinion, dated November 28, 1968, stated that the District

Court had properly exercised its discretion in declining to accept jurisdiction of this suit.

Thereafter, Garis instituted an action in the Supreme Court of the State of New York, County of New York, by service upon the owner's agent on June 10, 1968. That suit claimed damages for the same accident which was the subject of the Federal Court action dismissed by District Judge McClean. After discovery proceedings, the defendant moved to dismiss this action against San Basilio, S.A. on the ground of *forum non conveniens*. This motion was submitted on August 11, 1971 to Mr. Justice Paul A. Fino, who dismissed the action in a decision dated October 13, 1971.

Judge Fino's decision also provided that the dismissal of the suit be conditioned upon a waiver by San Basilio of any objection to the jurisdiction of the Greek Court or to any claim of time-bar. Judge Fino further directed that San Basilio provide security in the amount of $150,000.00 to guarantee appearance in a Greek suit.

In accordance with this direction, defendant's counsel provided a Letter of Guarantee, issued by the defendant's insurer and accepted by Garis' attorneys. This letter assured the appearance by San Basilio in any suit commenced by Garis in Greece and further guaranteed that San Basilio would admit ownership, operation and control, that it would make no objection to the jurisdiction of the Greek Courts, and that it would waive any applicable Statutes of Limitation.

Thereafter, the plaintiff appealed the dismissal for *forum non conveniens* to the Appellate Division, First Department. This dismissal was unanimously upheld by the Appellate Division on March 8, 1974.

The plaintiff then moved for leave to appeal to the Court of Appeals of the State of New York, and this motion was denied on July 14, 1974.

Thereafter, the plaintiff-appellant appealed the *forum non conveniens* dismissal to the Supreme Court of the United States, pursuant to 28 U.S.C.A. 1257(1). This appeal to the Supreme Court was dismissed on December 16, 1974 and the Petition for Certiorari was denied at that time, 419 U.S. 1065.

The present action, under Docket No. 74 Civ. 5527 (TPG), was filed on December 17, 1974, and the defendant-appellee's motion to dismiss for *res judicata* was filed on January 22, 1975. Following an adjournment because of illness of plaintiff's counsel, the motion to dismiss for *res judicata* was submitted to District Judge Thomas P. Griesa, who granted the motion in a decision dated March 12, 1976.

The motion by the defendant-appellee and the dismissal by Judge Griesa were based upon the fact that the most recent suit was brought by the same plaintiff against the same defendant, for the same cause of action which was the subject of the previous litigation.

POINT I

Dismissal on jurisdictional grounds constitutes *res judicata.*

The principal basis for this appeal is the argument by the appellant that the prior Courts' declinations of jurisdiction were not on the merits, and that therefore, they cannot be considered *res judicata.* This contention was expressly rejected by District Judge Griesa's opinion which emphasized that *res judicata* applies to questions of jurisdiction. This was the holding of the Supreme Court of the United States in *American Surety Co.* v. *Baldwin,* 287 U.S. 156 (1932), an authority relied upon by Judge Griesa. At pages 166 and 167 the Supreme Court stated unequivocally that the principles of *res judicata* apply to jurisdictional questions.

The Court of Appeals for the Second Circuit followed the Supreme Court's decision, in *Ripperberger* v. *A. C. Allyn & Co. Inc.,* 113 F. 2d 332 (1940), an authority cited by the District Court in the instant case. Prior actions by Ripperberger had been dismissed because of the District Court's lack of jurisdiction for want of venue. The plaintiff brought a subsequent suit against the same defendants, in addition to another party which had not been previously sued. The defendants' motion to dismiss the complaint for *res judicata* was granted, and an appeal to the Court of Appeals for the Second Circuit resulted.

The appellant Ripperberger conceded that a decision to retain jurisdiction would be *res judicata,* but argued that a lower Court's declination of jurisdiction would not bar a subsequent action. The Court of Appeals rejected this argument and held that a Court has a right to determine whether or not it has jurisdiction of the subject matter and parties to the suit. The decision affirming the dismissal for *res judicata* cited *American Surety Co.* v. *Baldwin,* 287 U.S. 156, for the proposition that *res judicata* applies to questions of jurisdiction as well as to other matters.

This principle was upheld by a subsequent Second Circuit decision, *Koziol* v. *Fylgia,* 230 F.2d 651 (1956), also cited by Judge Griesa in his opinion dismissing this Garis suit. Koziol was a foreign seaman who had brought a number of actions against his employer. These suits had been dismissed by the District Court, which in its discretion declined to accept jurisdiction of actions between foreigners. The last suit brought by this libellant was dismissed by the District Judge on the ground that the previous rejections of discretionary jurisdiction constituted *res judicata.* Evidently the subsequent complaint contained additional causes of action, but the Court found that the suit was still based upon the original claim of an injury aboard the vessel. The Court of Appeals agreed

with the District Judge's opinion that the last action was barred by the dismissal of the previous suits, which constituted *res judicata.*

A situation similar to Garis was considered by the United States District Court for the Southern District of New York in *Vassos* v. *Societa Trans-Oceania Canopus,* 143 F. Supp. 945. This claimant brought an action in admiralty against a shipowner under the General Maritime Law, in spite of the fact that he had previously brought a similar action on the civil side. The prior action had been dismissed on several grounds, including the Court's exercise of its discretion not to entertain jurisdiction. The District Court dismissed the subsequent suit upon motion, in reliance upon the dismissal of the previous action. District Judge Bicks stated at page 946:

> "Moreover, an injured seaman suffers but one actionable wrong and is entitled to but one recovery whether his injury is due to the unseaworthiness of the vessel, the negligence of the owner as defined by the General Maritime Law, the negligence of the officers, or the crew, as defined by the Jones Act, or by a combination of some or all of such cases. 'In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex'. *Baltimore S.S. Co.* v. *Phillips,* 1927, 274 U.S. 316, 321, 47 S.Ct. 600, 602, 71 L.Ed. 1069. The libelant was bound to set forth in his first suit every ground of recovery 'which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them piecemeal, in successive actions to recover for the same wrong and injury." Id., 274 U.S. at page 322, 47 S.Ct. at page 603.

This dismissal was affirmed by the United States Court of Appeals for the Second Circuit at 272 F.2d 183, Cert.

denied 362 U.S. 935. Although the appellant had attempted to assert a new theory of liability, the Court of Appeals found that the claim was *res judicata* on jurisdictional as well as substantive issues.

One of the authorities relied upon by the Second Circuit in *Vassos* was the Supreme Court of the United States' decision in *Angel* v. *Bullington*, 333 U.S. 183. The statement of the Supreme Court in *Angel* flatly contradicts the Garis' argument that a jurisdictional dismissal is not *res judicata* because it does not rule upon the "merits" of the case. This was the impact of the Supreme Court's language at page 190:

> "It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a Court has not passed on the 'merits' in the sense of the ultimate substantive issues of the litigation. A judication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another Court of the State."

The doctrine of *res judicata* is too familiar to require extensive quotations from numerous decisions. A general statement of the position taken by the Courts was contained in the Third Circuit opinion in *Bruzewski* v. *U.S.A.*, 171 F.2d 419, cert. den. 33 U.S. 828. Referring to a longshoreman's suit which had been brought first against the operator of the vessel and then against its owner, the Court stated at page 421:

> "This second effort to prove negligence is comprehended by the generally accepted precept that a party who has had a fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time."

Please see also *Blonder-Tongue Lab.* v. *University Foundation,* 402 U.S. 313; *Caterpillar Tractor Co.* v. *International Harvester Company,* 120 F.2d 82; *Hedger Transportation Corp.* v. *Ira S. Bushey,* 92 F. Supp. 112, Aff'd 186 F. 2d 236.

POINT II

There have been no legal or factual changes to prevent the application of *res judicata.*

The appellant argues in Point III of his brief that there had been changes of law and fact since the dismissal of the original action brought by Garis in the United States District Court for the Southern District of New York. Briefs submitted to District Judge Griesa and to this Court have contended that the law with respect to discretionary jurisdiction was changed by *Hellenic Lines* v. *Rhoditis,* 398 F. Supp. 306 and *Moncada* v. *Lemuria Shipping Corp.,* 491 F. 2d 470. As pointed out by the defendant-appellee in the papers submitted to Judge Griesa, Garis' attorneys have constantly relied upon the *Rhoditis* and *Moncada* decisions throughout the various motions and appeals to the Courts of the State of New York, and to the Supreme Court of the United States. None of these Courts was persuaded by this argument.

District Judge Griesa referred to this contention and held that *res judicata* was applicable. He further concluded that the subsequent decisions would have had no effect upon District Judge McClean's dismissal of the original suit.

This appeal is concerned only with the applicability of *res judicata,* and does not involve the issue of *forum non conveniens.* However, as noted by District Judge Griesa, the initial dismissal of the Garis' action would not have been affected by the *Rhoditis* decision. There were sharp distinctions between the facts of each case. Rhoditis was

injured in an American port; Garis' accident occurred on the high seas. Rhoditis' employer had its largest office in New York; San Basilio, the owners of the vessel where Garis was injured, has its principal place of business in Piraeus, Greece. 95% of Hellenic Lines' stock was owned by a United States resident; all of the directors and stock holders of San Basilio were citizens and residents of Greece. Rhoditis' ship made regularly scheduled visits to United States ports; Garis' vessel was engaged in the tramping trade and made no regular stops in American ports.

In a further effort to avoid application of *res judicata*, on the grounds of an alleged change in the law, the appellant has cited *Tsakonites* v. *Transpacific Carriers Corp.*, 368 F.2d 426, later reopened in a decision reported in 322 F. Supp. 722. The same argument refers to *Bartholomew* v. *Universe Tankships, Inc.*, 363 F.2d 432 and *Tjonaman* v. *A/S Glittre*, 340 F.2d 290. Any contention that these decisions would have affected the result in Garis, disregards the fact that these authorities pre-dated the District Court's dismissal of *Garis*, reported at 361 F. Supp. 917, and affirmed by the United States Court of Appeals for the Second Circuit on November 28, 1967 at 386 F.2d 155.

In the same vein, the appellant has attempted to demonstrate factual changes by the submission to the District Court and the Court of Appeals of numerous exhibits (1-20), consisting primarily of advertisements, tariffs, bank records and other papers purporting to demonstrate that the shipowners and its agents were doing business in New York. It is the appellant's position that these papers are not properly before this Court. However, even if admissible, these documents would not be relevant to either the issue of *res judicata* or the question of *forum non conveniens*. They relate primarily to the activities of the defendant-appellee shipowner's agent, which is not a party to this action.

In any event, these purported exhibits were submitted to District Judge Griesa in opposition to the defendant's motion for Summary Judgment, pursuant to Rule 56(a) and (c).

Rule 56 and the decisions interpreting it expressly limit the materials upon which Summary Judgment motion is to be decided. Rule 56(e) specifically provides that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein."

Clearly, the purported exhibits (1-20) fail to comply with the requirements that the papers be identified by affidavit or otherwise made admissible in evidence. *Douglas* v. *Beneficial Finance Co.*, 334 F. Supp. 1166; *Green* v. *Benson*, 271 F. Supp. 90; *United States* v. *Dibble*, 429 F. 2d 598.

Even if these papers were properly before this Court, their submission would constitute an invalid effort to overcome *res judicata*. No decision could ever be final if an unsuccessful litigant could prolong litigation in reliance upon arguments not initially made.

District Judge Bicks stated this proposition in a case very similar to the one at bar, *Vassos* v. *Societa Trans-Oceania Canopus*, 143 F. Supp. 945, at page 946.

> "The libelant was bound to set forth in his first suit every ground 'which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them piecemeal in successive actions to recover for the wrong and injury."

In support of this position, District Judge Bicks cited the opinion of the Supreme Court of the United States in *Baltimore Steamship S.S. Co.* v. *Phillips*, 274 U.S. 316.

POINT III

The factors which relate to the doctrine of *forum non conveniens* also establish that the Jones Act is not applicable.

It is evidently the position of the plaintiff-appellant that the Jones Act should apply to Garis' suit, and that the District Court could not exercise its discretion in declining jurisdiction. The obvious fallacy of this argument is that it begs the question, because the same factors apply in determining whether jurisdiction should be retained and in deciding whether the Jones Act applies.

This was the holding of the Court of Appeals for the First Circuit in *Anastasiadis* v. *S.S. Little John*, 346 Fed. 2d 281. It was stated at page 283:

> "Both parties place reliance on the leading case of *Lauritzen* v. *Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1952). That case dealt primarily with the circumstances under which a foreign seaman is entitled to invoke the Jones Act, 46 U.S.C.A. 688, as a remedy for his personal injuries. The real issue in Lauritzen, therefore, was choice of law, not the discretionary assumption of jurisdiction, but it seems generally agreed that the criteria set out in that opinion serves as an appropriate yardstick for a District Court in deciding whether the United States Courts should accept or decline jurisdiction in a controversy which is essentially foreign. See *Zouras* v. *Menelaus Ship Company* (1 Cir. 1964), 366 Fed. 2d 209."

The facts in other cases demonstrate that the Courts consistently rely upon the same elements in determining whether the Jones Act applies, and in deciding whether to invoke the doctrine of *forum non conveniens*. The United States District Court for the Southern District of

New York decided that the Jones Act was inapplicable and declined jurisdiction of a suit brought by *Brillis* v. *Chandris (U.S.A.), Inc.*, 315 F. Supp. 520 (1963).

Judge Dawson found that the contacts with the United States were minimal and insufficient for the application of the Jones Act. He went on to state at page 523:

> "The second defense raised by the defendant seeks to invoke the doctrine of *forum non conveniens* and is addressed to the discretion of the Court. It is unnecessary to set forth anew the factual grounds upon which the Jones Act was found to be inapplicable. All are relevant in determining whether to retain jurisdiction over this controversy."

Samaras v. *The SS Jacob Verolme*, 187 F. Supp. 408 (1960), also involved a claim by a Greek seaman for injuries sustained on the high seas. The shipowner was Dutch, and unlike Garis' ship, the vessel made regular visits to the United States ports. The same factors lead the District Judge to find the Jones Act inapplicable, and also to decline jurisdiction under the *forum non conveniens* doctrine.

It should be borne in mind that an action by the same plaintiff, Dimitrios Garis, was brought in the United States District Court for the Southern District of New York against San Basilio, the same shipowner. This action was dismissed for *forum non conveniens* by District Judge McLean, 261 F. Supp. (1966). It is significant that Judge McLean expressly held that the "contacts" with the United States were insufficient for either the application of the Jones Act or for the retention of discretionary jurisdiction.

Judge McLean stated at page 919:

> "If this action were to be tried in this court, it seems clear that Greek law would apply, not only because the parties agreed that it would, but also because a weigh-

ing of the factors listed in *Lauritzen* v. *Larsen*, 345 U.S. 571, 72 S.Ct. 921, 97 L.Ed. 1254 (1953), leads to the same conclusion."

It should also be noted that the Court of Appeals in *Hernandez* v. *Cali, Inc.*, 27 N.Y. 2d 903 upheld the dismissal of a Jones Act suit which had been dismissed for *forum non conveniens*. The Court of Appeals affirmed the decision of the Appellate Division of the First Department, 32 A.D. 2d 192, which had in turn affirmed an Order of Dismissal of Special Term, New York County. Special Term, the Appellate Division, and the Court of Appeals, all agreed that the factors which justified declination of discretionary jurisdiction also rendered the Jones Act inapplicable.

CONCLUSION

It is therefore respectfully requested that the order of the Court below dismissing this suit be affirmed in all respects.

Respectfully submitted,

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(6073)

UNITED STATES COURT OF APPEALS
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AFFIDAVIT OF SERVICE BY MAIL

On Appeal From the United States District Court
For the Southern District of New York

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Helen D'Esposito , being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 28 Ridge Road, Albertson, New York 11507
That on July 28, 1976 , she served Two copies of the Brief

on

Lebovici & Safir
15 Maiden Lane
New York, New York 10038

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

...Helen D'Esposito.....

Sworn to before me this
28th day of July , 1976

Charles J. Esposito

CHARLES J. ESPOSITO
Notary Public, State of New York
No. 30-1132025
Qualified in Nassau County
Commission Expires March 30, 1977